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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOHN R. DOOLITTLE,

Petitioner,

v.

NATIONAL CREDIT UNION ADMINISTRATION,

Respondent

On Petition For a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Steven R. Bisker, Esq.
Counsel of Record
Steven R. Bisker
Attorney at Law
616 S. Washington Street
Alexandria, VA 22314
(703) 739-0292

48 pp

QUESTION PRESENTED

Whether a prohibition order issued under 12 U.S.C. §1786(g)(1), involving a lifetime ban from working for, or having any involvement with, a federally chartered or insured financial institution can be imposed without notice and an opportunity to be heard.

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JOHN R. DOOLITTLE,
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NATIONAL CREDIT UNION ADMINISTRATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

John R. Doolittle respectfully petitions for a writ of certiorari review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on petition for rehearing and suggestion of rehearing en banc (App., infra, a-1) is unreported.

The opinion of the court of appeals on petition for review from the National Credit Union Administration Board (App., infra, a-3) is unreported ("Doolittle II").

The decision and order on remand of the National Credit Union Administration (App., infra, a-5-a-15) is unreported.

The order of the court of appeals awarding attorney's fees and expenses (App., infra, a-16) is unreported.

The opinion of the court of appeals on petition for review from the National Credit Union Administration Board (App., infra, a-17 - a-33) is reported at 992 F.2d 1531 ("Doolittle I").

The final decision and order of the National Credit Union Administration Board (App,. infra, a-34 - a-42) is unreported.

JURISDICTION

On May 16, 1995 (App., infra, a-1), the court of appeals entered its denial of the petition for rehearing of its judgment entered on February 15, 1995 (App., infra, a-3). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Sections 206(g)(1), (4) of the Federal Credit Union Act, 12 U.S.C. §§1786(g)(1), (4) provide that:

> "(g) Removal and Prohibition Authority.-
> (1) Authority to issue order.
> Whenever the Board determines that-
> (A) any institution-affiliated party has, directly or indirectly-
> (i) violated-
> (I) any law or regulation;
> (II) any cease-and-desist order which has become final;
> (III) any condition imposed in writing by the Board in connection with the grant of any application or other request by such credit union; or
> (IV) any written agreement between such credit union and the Board;

(ii) engaged or participated in any unsafe or unsound practice in connection with any insured credit union or business institution; or

(iii) committed or engaged in any act, omission,or practice which constitutes a breach of such party's fiduciary duty;

(B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)-

(i) such insured credit union or business institution has suffered or will probably suffer financial loss or other damage;

(ii) the interests of the insured credit union's members have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice or breach; and

(C) such violation, practice, or breach-

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates such party's unfitness to serve as a director or officer of, or to otherwise participate in the conduct of the affairs of,an insured credit union,

the Board may serve upon such party a written notice of the Board's intention to remove such party from office or to prohibit any further participation, by such party, in any manner in the conduct of the affairs of any insured credit union.

* * * * *

> (4) A notice of intention to remove a director, committee member, officer, or other person from office or to prohibit his participation in the conduct of the affairs of an insured credit union, shall contain a statement of the facts constituting grounds therefor, and shall fix a time and place at which a hearing will be held thereon."

The Fifth Amendment of the United States Constitution provides, in pertinent part, that:

> "No person shall...be deprived of life, liberty, or property, without due process of law...."

STATEMENT

A. Proceedings Below

On February 12, 1991, the National Credit Union Administration (NCUA) filed a notice of intent to prohibit and impose other remedial sanctions (notice of intent) against John R. Doolittle (Doolittle). A formal administrative hearing was commenced on June 24, 1991. On August 31, 1991, the Administrative Law Judge presiding at the hearing issued a recommended decision. The NCUA entered a final decision and order on October 15, 1991 permanently prohibiting Doolittle from participating, in any manner, in the affairs of any federally chartered or insured financial institution and ordering Doolittle to pay restitution in the amount of $42,857. App., infra, a-34 - a-42. Doolittle timely filed a petition to modify, terminate or set aside the final order and decision with the United States Court of Appeals for the Eleventh Circuit.

On June 14, 1993, the court of appeals rendered a decision that vacated the NCUA's prohibition order and reversed the restitution order and remanded the matter to the agency for

reconsideration in accordance with its opinion. App., infra, a-17 - a-33. The Court reversed several of the NCUA's findings, including those concerning certain loans (i.e., the "Mims loans") and certain accounting issues, as not supported by competent substantial evidence. The Court affirmed the other findings in the prohibition order. Upon petition and review, the Court awarded Doolittle attorney's fees and expenses as the prevailing party in Doolittle I. App., infra, a-16.

On January 19, 1994, the NCUA issued yet another prohibition order which permanently prohibited Doolittle from ever working in any federally insured or chartered financial institution. App., infra, a-5 - a-15. Doolittle timely filed a petition with the court of appeals to modify, terminate or set aside the decision and order on remand.

Oral argument was presented before Chief Judge Tjoflat, Circuit Judge Birch, and Senior Circuit Judge Henderson on February 2, 1995. On February 15, 1995, the Court issued a per curiam decision in which it affirmed the prohibition order. App., infra, a-3.

B. John Doolittle And His Travails With The NCUA

John Doolittle worked for Bay Gulf Federal Credit Union ("Bay Gulf" or the "Credit Union") for 18 years. For the last eight years of that employment, he served as the Credit Union's President.

Doolittle's employment with Bay Gulf was terminated on April 19, 1990, by a vote of the credit union's board of directors. Doolittle has maintained since his termination that the board's action was the result of the improper and illegal influence of David Becker, a consultant referred to Bay Gulf by the NCUA's supervisory examiner, James Dupre. Becker replaced Doolittle as president of the Credit Union. Subsequent to his termination, Doolittle filed a breach of contract lawsuit against the Credit Union and a tortious interference with a business and contractual

relationship claim against Becker. The lawsuit against the Credit Union is on appeal before the Second District Court of Appeals for the State of Florida and the lawsuit against Becker has been settled.

On February 12, 1991, nearly 10 months after Doolittle had been terminated from the Credit Union, the NCUA filed its notice of intent. This action quickly followed Doolittle's filing of his breach of contract claim against the Credit Union. After an administrative hearing on the notice of intent, the NCUA found, in its final decision and order, that based on the "Mims loans", Doolittle engaged in an unsafe and unsound practice in connection with the Credit Union, committed an act or omission or practice constituting a breach of his fiduciary duty and, by reason of such conduct, violation, or breach, the Credit Union has suffered, or will probably suffer, substantial financial loss, and the interests of the members of the Credit Union could be seriously prejudiced and, further such conduct, violation or practice demonstrates Doolittle's unfitness to participate in the affairs of an insured financial institution. App., infra, a-34 - a-42. The NCUA also held that Doolittle's actions involving the "Mims loans" were with reckless disregard for applicable regulation and that he was, therefore, liable for restitution to the Credit Union in the amount of $42,857.00.

In Doolittle v. National Credit Union Administration, 992 F.2d 1531 (11th Cir. 1993) (Doolittle I)(App., infra, a-27), the Court found, Id. at 1538 that Doolittle did not engage in an unsafe or unsound practice with regard to the "Mims loans". The Court also found that the allegations asserted in the notice concerning accounting issues involving the data processing expenses, the ATM and NSF fees, and the employee leave time expenses, did not violate NCUA's full and fair disclosure regulation. Id. at a-25 - a-26. The Court affirmed NCUA's finding that Doolittle's actions with respect to specified accounting activity violated its regulation governing full and fair disclosure of Bay Gulf's financial condition. Id. a-24 - a-25.

Neither the administrative record nor the Court's opinion establish that Doolittle's actions were intended to provide any personal benefit to him or caused Bay Gulf to suffer any financial

loss. Rather, the Court held that: "[t]he Notice of Intent did not allege and the record does not indicate that Doolittle derived any personal gain from the conduct set forth in the charges." App., infra, a-16.

On remand, the NCUA determined that Doolittle personally benefited from his actions which the Court in Doolittle I held to be in violation of NCUA's regulation. App., infra, a-10 - a-11. Based on this determination, the NCUA again issued the prohibition order.

There is no evidence in the record to support the conclusion that Doolittle received any personal benefit from his actions at Bay Gulf. Instead, the NCUA has conjectured that Doolittle received personal gain in the form of maintaining his employment, however, that charge was never formally raised by NCUA in the notice of intent, and is contradicted by all the evidence related to the issue in the administrative record. Doolittle was not put on notice of this allegation and did not have the opportunity to defend against it.

REASONS FOR GRANTING THE PETITION

I. Petitioner was Denied his Fifth Amendment Right to Due Process Since the Notice of Intent Did Not Allege and the Administrative Record Did Not Establish that he Personally Benefited From his Acts

A Prohibition Order may lawfully be imposed when the three required elements are established -- (1) "misconduct" under 12 U.S.C.§1786(g)(1)(A); (2) "effect" under 12 U.S.C. §1786(g)(1)(B); and (3) "culpability" under 12 U.S.C. §1786(g)(1)(C).

In order to establish the "effect" element of Section 1786(g)(1)(B),[1] the notice of intent to prohibit alleged that Doolittle

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[1] Section 1786(g)(1)(B) contains three alternate "effect" elements: " (i) such insured credit union ... has suffered or will probably suffer... financial loss or other damage; (ii) the interests of the insured credit union's members have

caused the credit union to "incu[r] substantial financial losses and other injury." In Doolittle I, the Court held that Count V (the "Mims Loans"), the allegation relied upon by the NCUA to support the "effect" requirement, was not supported by substantial evidence. App., infra, a-26. The Court also held that "[t]he Notice of Intent did not allege and the record does not indicate that Doolittle derived any personal gain from the conduct set forth in the charges...." (Emphasis added.) Id at a-16.

The second NCUA prohibition order was issued without further hearing and was based upon the same notice of intent, however this time the NCUA based its "effect" finding on "personal benefit" to Doolittle. App., infra, a-10 - a-11.[2] The NCUA decided in this manner despite the Court's ruling in Doolittle I and the failure to allege such "effect" in the notice of intent. The prohibition order affirmed by the Court in Doolittle II, in its per curiam ruling should be reversed because: (1) the notice of intent did not allege and the record does not indicate that Doolittle derived any personal gain nor that the Credit Union has or will suffer financial loss from the conduct set forth in the charges; and (2) Petitioner was never provided notice and opportunity to be heard on these issues -- denial of due process under the Fifth Amendment.

II. The Court's Decision is Contrary to the Precedent of the Eleventh Circuit

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been or could be prejudiced; or (iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach..."

[2] The NCUA finding also maintains, in an obtuse fashion, and for the first time, that the payment of dividends to the Credit Union's members when in excess funds available "threatens the financial soundness of a credit union and can lead to the institution's insolvency." (Emphasis added.) App., infra, a- 9. This "finding" is supposition of possible loss to "a credit union", not Bay Gulf, the credit union involved here. Further, such allegation was not included in the notice of intent and was not argued or otherwise presented during the course of the administrative hearing. To the extent that petitioner had an opportunity to address such allegation, it was limited to his briefs filed with the NCUA on the remand.

The holding by the panel in Doolittle II is contrary to the holding of the panel in Doolittle I, with respect to the "effect" element.

Given that the prohibition order cannot stand without satisfying each required element (i.e., "conduct", "effect", and "culpability"), the court of appeals panel in Doolittle II was without authority to affirm the prohibition order in light of the panel's decision in Doolittle I. The Eleventh Circuit has consistently held that prior decisions of panels may only be overruled by the court of appeals sitting en banc or by the United States Supreme Court. United States v. Evans, 910 F. 2d 790 (11th Cir. 1990). When it affirmed NCUA's issuance of the prohibition order, which principally relied upon Doolittle's alleged personal gain to satisfy the "effect" element in 12 U.S.C. §1786(g)(1)(B), the panel in Doolittle II overruled the precedent established by the panel in Doolittle I and in so doing exceeded its authority.

III. The Question Presented is Important

There are few, if any, greater wrongs than to allow any government, particularly our own, to wrongfully deprive any of its citizens the right to work in his or her chosen profession -- that's what this case is about.

As Congress has stated,[3] and several courts of appeals have held, the authority to remove and prohibit is an "extraordinary power" given to the Federal regulator. "[T]he power to remove a

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[3] The authority to remove and suspend is:

> "...an extraordinary power, which can do great harm to the individual affected and to his institution and to the financial system as a whole. It must be strictly limited and carefully guarded.
>
> The duty and responsibility of suspending or removing bank officials is a quasi-judicial function of the highest delicacy, requiring the most careful balancing of the interests of the depositors, savers, borrowers, and the Government and the public generally on the other hand."

S. Rep. 1482, 89th Cong., 2nd Sess., (1966) reprinted in 1966, U.S.C.C.A.N. 3539, 3540.

bank officer is an extraordinary power that should be carefully exercised in strict accordance with the law." Seidman v. OTS, 37 F.3d 911 (3d Cir. 1994), citing cf., Manges v. Camp, 474 F.2d 97, 100-101 (5th Cir. 1973); see also, Oberstar v. F.D.I.C., 987 F.2d 494, 502 (8th Cir. 1993); Kim v. OTS, 40 F. 3d 1050 (9th Cir. 1994).

In light of such power, the public should be able to expect greater attention to due process, not less. It is of exceptional public importance that the NCUA be made to adhere to Constitutional mandates in its exercise of such an extraordinary power.

This Court has recognized the existence of a property and liberty interest in the right of an individual to hold specific private employment and to follow in his or her chosen profession without unreasonable government interference. Greene v. McElroy, 360 U.S. 474, 492 (1959). As this Court has stated, Id. at 496-497:

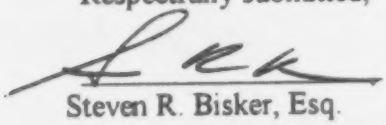
> "Certain principles have remained immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individualso that he has an opportunity to show that it is untrue...We have formalized these protections in the requirements of confrontation and cross-examination...This Court has been zealous to protect these rights from erosion...It has spoken out not only in criminal cases [citations omitted] but also in all types of cases where administrative and regulatory actions were under scrutiny."

NCUA's Prohibition Order must not be allowed to stand where, as is the case here, the agency has failed to give adequate notice and opportunity to respond. See, Mullane v. Central Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 656 (1950); Bendix Corp. v. FTC, 450 F.2d 534, 542 (6th Cir. 1971).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Steven R. Bisker, Esq.
616 S. Washington Street
Alexandria, VA 22314
(703) 739-0292
Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94-2154

JOHN R. DOOLITTLE, a former officer, director, and employee of Bay Gulf Federal Credit Union

Petitioner,

versus

NATIONAL CREDIT UNION ADMINISTRATION

Respondent

Petition for Review of a Decision and Order of the National Credit Union Administration

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(May 16, 1995)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, BIRCH, Circuit Judge and HENDERSON, Senior Circuit Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having

been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

(UNPUBLISHED)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-2154

NCUA DKT NO. 91-0201-III

JOHN R. DOOLITTLE, a former officer,
director, and employee of Bay Gulf
Federal Credit Union,

Petitioner,

versus

NATIONAL CREDIT UNION ADMINISTRATION,

Respondent

Petitioner for Review of a Decision and order
of the National Credit Union Administration

(February 15, 1995)

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge and
HENDERSON, Senior Circuit Judge.

PER CURIAM:
AFFIRMED. See llth Cir. R. 36-1.[1]

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[1] 11 th Cir. R. 36-1 provides:
When the court determines. that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by

substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION
ADMINISTRATION BOARD
ALEXANDRIA, VA

In the Matter of

JOHN R. DOOLITTLE,
a former officer, director, and employee
of Bay Gulf Federal Credit Union

Decision and Order on Remand
Decision
(January 19, 1994)

This case is before the National Credit Union Administration Board ("Board") ("NCUA") for reconsideration of a prohibition order after remand by the United States Court of Appeals for the Eleventh Circuit, Doolittle v. NCUA, 992 F.2d 1531 (11th Cir. 1993).[1] The Eleventh Circuit affirmed in part and reversed in part the Board's determination that Respondent violated NCUA regulations. The court vacated the order of prohibition and remanded for reconsideration in accordance with its opinion. The court also reversed the Board's order of restitution. Upon remand, the Board directed the parties to submit briefs on the issues outlined by the court. Both parties filed briefs and reply briefs. For the

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[1] On February 12, 1991, the Board issued a Notice of Intent to Prohibit and Impose Other Remedial Sanctions against Respondent John R. Doolittle ("Respondent" or "Doolittle"), an officer and director of Bay Gulf Federal Credit Union, Tampa, Florida ("Bay Gulf or "credit union"). Following an administrative hearing, Administrative Law Judge ("ALJ") Frederick M. Dolan, Jr., issued a decision recommending that Doolittle be prohibited from future participation in the conduct of the affairs of any federally insured credit union and that he be ordered to make restitution to Bay Gulf in the amount of $42,857. On October 15, 1991, the Board issued a final decision and order adopting the ALJ's recommended decision. Respondent appealed the Board's decision to the Eleventh Circuit.

reasons set forth below, the Board has again determined to issue a prohibition order against Respondent.

Applicable Law

Pursuant to Section 206(g)(1) and (4) of the Federal Credit Union Act ("FCU Act"), 12 U.S.C §1786(g)(1) and (4), the Board is authorized to issue an order prohibiting a party from participating in the conduct of the affairs of an insured credit union when it determines that the record establishes each of three elements- 1) the party has engaged in a specified type of misconduct -- violation of law, regulation, or order of the Board, unsafe or unsound practice, or breach of fiduciary duty" 2) the misconduct has a prescribed effect -- financial gain or other benefit to the respondent, financial loss or other damage to the credit union, or prejudice to the credit union's members" and 3) the misconduct involves personal dishonesty or demonstrates the party's unfitness to participate in the conduct of the affairs of an insured credit union. Once an order of prohibition is issued against a party with respect to insured credit unions, it is unlawful for that person to participate in any manner in the conduct of the affairs of any federally insured financial institution without the prior approval of the appropriate federal regulatory agency. 12 U.S.C. §1786(g)(7).

Background

The Board found that Respondent had misrepresented the credit union's financial condition by engaging in certain accounting improprieties. This misrepresentation was a violation of 12 C.F.R. §702.3, which requires that credit union financial statements provide for full and fair disclosure of assets, liabilities, members' equity, and all income and expenses.[2] The Board also found that

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[2] "Full and fair disclosure" is defined as the level of disclosure which a prudent person would provide to a member of a federal credit union, NCUA, or a creditor in order to fairly inform them of the financial condition and the results of operations of the credit union. 12 C.F.R. §702.3(a).

Respondent had engaged in an unsafe and unsound practice and breached his fiduciary duty in failing to prevent certain illegal loans made by the credit union. The Board found that by reason of the violation, practice, and breach, the credit union had suffered or would probably suffer financial loss, and the interests of its members could be prejudiced. Finally, the Board found that the violation, practice, and breach demonstrated Respondent's unfitness to serve in the credit union.

The Eleventh Circuit held that the evidence did not support our finding that Respondent was responsible for the illegal loans. Doolittle v. NCUA, 992 F.2d at 1537. The court also held that certain of the accounting improprieties did not constitute a violation of full and fair disclosure. Id. However, the court held that the evidence supported the Board's finding with respect to the remaining accounting improprieties. Id. Because it had reduced the number of violations supporting the prohibition order, the court remanded the case to the Board to reconsider that order. Id. at 1538. Therefore, the only issue before the Board at this time is whether the accounting improprieties affirmed by the court warrant the issuance of a prohibition order.

Findings and Conclusions

A. Misconduct

The court agreed that the following accounting improprieties supported the Board's determination that Doolittle misrepresented the credit union's financial condition and violated full and fair disclosure requirements:

1) Bay Gulf owned certain property, known as Priority One, as the result of foreclosure on a delinquent loan. Despite obtaining a market analysis showing a drop in the value of the property of almost $200,000, Respondent neither changed the valuation on the books nor adjusted the loan loss reserve to reflect a probable loss on the outstanding loan.[3] This resulted in inflating the

[3] Notwithstanding Respondent's argument that the market analysis was not an appraisal, at a minimum, it alerted Respondent to the fact that there was

credit union's income for the first quarter of 1990 and concealing the deficit in the credit union's undivided earnings. As the ALJ found, and the court noted, the credit union had $50,000 in undivided earnings for the first quarter of 1990. ALJ's Recommended Decision ("RD"), Appendix ("Ap.") A, Section ("Sect.") 1, ¶91; Doolittle v. NCUA, 992 F.2d at 1534. Respondent acknowledged that writing down the value of the Priority One property would have exhausted undivided earnings. ALJ's RD, Ap. A, Sect. 1, ¶67; Transcript III at 93-94.

2) Respondent directed that a legal expense of over $10,000 that was invoiced in March 1990 be recorded as an expense in April and that a reimbursement check for the expense that was received in April be recorded as income for March. The recording method did not comply with either accrual or modified cash basis accounting, which are the two authorized accounting methods for credit unions. ALJ's RD, Ap. A, Sect. 1,¶¶68-71, 99, 130. Respondent's own expert witness agreed that Respondent's recording method was misleading and would inflate income. Id. at ¶1 30; Transcript II at 50-51. The ALJ found, and the court noted, that Bay Gulf's net income for the first quarter of 1990 was $2,500. ALJ's RD, Ap. A, Sect. 1, ¶1 00; Doolittle v. NCUA, 992 F.2d at 1534. As the ALJ found, if the legal expenses had been recorded in March, there would have been a net loss for the first quarter of 1990 of approximately $7,500. ALJ's RD, Ap. A, Sect. 1, ¶100.

3) In March 1990, Respondent directed that the depreciation lives of certain of the credit union's fixed assets be lengthened to reduce expenses. Such changes can only be made in certain circumstances, none of which were present. ALJ's RD, Ap. A, Sect. 1, ¶¶144-145. Although financial statements should disclose any changes in accounting estimates and any impact from such changes on profit and loss, no disclosure of the changes was made. Id. at ¶147. The net effect of the changes was to decrease

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a serious question regarding the valuation of the property and further action was required.

the depreciation expense in March 1990 by $2,600. Id. at ¶148. If the changes had not been made, the credit union would have shown a loss for the first quarter of 1990. Id.

By engaging in these actions, Respondent violated 12 C.F.R. §702.3, which requires full and fair disclosure of the credit union's financial condition and results of operations. While the total amounts involved may seem insignificant in light of the fact that Bay Gulf had approximately $50 million in assets, they gain significance and, as can be seen from the above information, are in fact material, considering their effect on the credit union's profitability and undivided earnings.

B. Effect

Credit union dividends are paid out of current income, after providing for required transfers to the statutory reserves, plus any available balances in undivided earnings. NCUA Accounting Manual for Federal Credit Unions §5070.4 (1989). Before distributing a dividend, a credit union is required to adjust its loan loss reserve to reflect any anticipated losses. 12 C.F.R. §702.3(c)(2). Without the accounting improprieties, Bay Gulf would have shown a loss for the first quarter of 1990 and a deficit in undivided earnings. By virtue of Respondent's misconduct, the board of directors of Bay Gulf did not have an accurate picture of the financial condition and results of operations of the credit union for the first quarter of 1990.

Deprived of accurate information, a board of directors may unwittingly act against the credit union's best interest and put the credit union in a position to suffer financial loss. Bay Gulf's board declared and paid dividends for the first quarter of 1990, unaware that the credit union had insufficient earnings to do so. The Board notes that paying dividends illegally, i.e., in excess of funds available for that purpose, threatens the financial soundness of a credit union and can lead to the institution's insolvency.

Respondent argues that the credit union's statutory reserves could have been transferred to undivided earnings to cover the loan

loss, enabling the credit union to pay dividends legally. Respondent asks the Board to take notice of the credit union's statutory reserves on December 31, 1989, and in June 1990, arguing that they were sufficient for such a transfer. See Respondent's Brief in Opposition to Reissuance of the Order of Prohibition, fn. 3, Respondent's Reply Brief on Remand at 7-8. Respondent's assertions are irrelevant; reliance on a transfer from statutory reserves was not raised as a basis for or rationalization of Respondent's conduct. Furthermore, the period at issue closed on March 31, 1990, not December 1989 or June 1990. In any event, as recognized by Respondent's own expert witness, once undivided earnings are eliminated, NCUA approval is required to pay a dividend. Transcript II at 44. Respondent failed to advise the board of directors that a transfer from statutory reserves was necessary to pay a dividend, that NCUA approval was required for such a transfer, and the effect such a transfer would have on the credit union's financial condition.

The Board also notes that the evidence in the record establishes that Respondent personally benefited from the accounting practices. Relying on that evidence, the court observed that prior to Respondent engaging in the misconduct at issue, NCUA had downgraded the competency rating of Bay Gulf's management due to its inability to improve the financial condition of the credit union. Doolittle v. NCUA, 992 F.2d at 1537. The court concluded that Doolittle "was probably under some pressure to show a profit for the first quarter of 1990 so that Bay Gulf could declare a dividend." Id. The Board believes that Doolittle engaged in the misconduct at issue to avoid whatever threat lay behind that pressure.[4] This constitutes a personal benefit to him and is an independent basis for concluding that the second element of the prohibition authority has been met.

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[4] Contrary to Respondent's assertions, this issue was raised during the proceedings below. At the hearing before the ALJ, the attorney representing NCUA described the accounting improprieties she would establish during the course of the hearing and then stated, "The benefit to Mr. Doolittle from these accounting maneuvers, given his position as General Manager, is clear: if the credit union looked good, he would look good, and his job would be protected." Transcript I at 14.

C. Personal Dishonesty/Unfitness

The final element required to issue a prohibition order under the FCU Act is a determination that the misconduct involves personal dishonesty or demonstrates the party's unfitness to participate in the conduct of the affairs of an insured credit union. Dishonesty goes to lack of integrity, truth, or trustworthiness. See Van Dyke v. Board of Governors, 876 F.2d 1377, 1379 (8th Cir. 1989); Greenberg v. Board of Governors, 968 F.2d 164, 171 (2d Cir. 1992). Unfit has been defined as "unsuitable; incompetent; not adapted or qualified for a particular use or service. . ." Black's Law Dictionary, Fifth Ed. (1979).

In the matter at hand, the Board's focus must be on whether Respondent's misconduct demonstrates that he is unsuitable, incompetent, or not qualified to participate in the conduct of the affairs of an insured credit union.[5] The court has instructed the Board that a finding of unfitness must be supported by an explanation of why Doolittle is unfit beyond merely stating that he violated a law or regulation. Doolittle v. NCUA, 992 F.2d at 1538. The court stated that a finding of unfitness must be supported by a finding of equal gravity to, or of similar magnitude as, personal dishonesty and must have weight commensurate with such a finding. Id. at 1538-1539.

As the Board reads the decision, the court's determination to require a finding of equal gravity to personal dishonesty was influenced by the nature of the remedy.[6] A lifetime prohibition is

[5] The Board believes there is sufficient evidence to establish that Respondent's conduct showed lack of integrity and trustworthiness and thus that it involved personal dishonesty. The Eleventh Circuit effectively agreed, concluding that Respondent's conduct "implie[d] intentional misrepresentation of the financial condition of Bay Gulf." Doolittle v. NCUA, 992 F.2d 1536. However, the case was not argued under that theory, and the Board declines to introduce it at this time.

[6] As the court stated, "The prohibition sanction adopted by the NCUA Board is harsh. Doolittle is precluded from working in his chosen profession for the remainder of his career. We must assume that the NCUA Board considered all of the accounting violations in fashioning this draconian sanction... . We

understandable in the case of a dishonest individual but, to some, may seem extreme in the case of a merely unqualified or incompetent one. Arguably, an incompetent individual could serve in a lesser capacity, a lifetime prohibition from all service would not be warranted. Therefore, under the court's analysis, a prohibition order based on unfitness should be supported by a finding that the conduct at issue demonstrates a level of unsuitability to work in any capacity in a credit union; a level at least as serious as that of dishonest conduct.[7]

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cannot assume that the NCUA Board would issue the same severe sanction without all of the violations upon which it previously relied." Doolittle v NCUA, 992 F.2d at 1538. The Board notes that, pursuant to Section 206(g)(4) of the FCU Act, 12 U.S.C. §1786(g)(4), if it finds that "any of the grounds" (emphasis added) have been established, it may issue a prohibition order. The Board also notes that a prohibition order is not necessarily permanent. Pursuant to Section 206(g)(7) of the FCU Act, 12 U.S.C. §1786(g)(7), after issuance of a prohibition order against a party, such party may request consent to participate in the conduct of the affairs of any institution defined in that section.

[7] While the Board agrees that an explanation of why a party is unfit should be provided, it does not necessarily concur with the court's determination that unfitness must be of equal gravity to dishonest conduct. The legislative history of NCUA's prohibition authority with respect to unfitness was not argued to the court, and the court did not address it-, however, it was argued to the Board on remand and sheds some light on congressional intent with regard to unfitness. The legislative history indicates that "unfitness" was intended to be an easier standard to meet than "personal dishonesty." Prior to 1977, issuance of a prohibition order against a credit union official based on misconduct occurring in that credit union required a finding of personal dishonesty', issuance of a prohibition order based on misconduct occurring in another institution required a finding of personal dishonesty and unfitness. Noting that the requirement of a finding of personal dishonesty was "an onerous burden for a financial regulatory agency," Congress in 1977 deleted the requirement of a finding of dishonesty where the misconduct occurred at the official's own credit union and changed the requirement to a finding of dishonesty or unfitness where the misconduct occurred in another institution. See H. R. Rep. No. 95-23, 95th Cong., 1 st Sess. 1, reprinted in 1988 U.S. Code Cong. & Ad. News 116-117. In 1989, 12 U.S.C. §1786(g)(1) was amended to its present form Financial Institution Reform, Recovery and Enforcement Act, Pub. L. No. 101-73. In this case, the Board's disagreement with the court is immaterial, as the Board believes that Respondent's level of unfitness is of similar magnitude as personal dishonesty.

A credit union's financial statements provide the vehicle for accomplishing the most important external function of the accounting process, that of presenting fairly the financial position of the credit union at a particular date and the results of operations for a particular period. See 12 C.F.R. §702.3(a). The financial statements are needed to permit management to make sound decisions and effectively manage the credit union and to show how management has carried out its stewardship to shareholders, creditors, or others having an interest in the credit union. NCUA Accounting Manual for Federal Credit Unions §2080.1 (1989). By hiding the fact that the Bay Gulf had insufficient earnings to declare a dividend, Respondent deliberately concealed the results of his management of the credit union, violating the trust of its directors and members.

The Board finds that Doolittle's intentional misleading of Bay Gulf's directors, those responsible for making decisions based on Respondent's representations, demonstrates his total unsuitability to participate in the conduct of the affairs of an insured credit union and warrants the issuance of a prohibition order against him. The Board's finding of unfitness is based not just on the violation of full and fair disclosure but on the fact that the violation was intentional.[8] In the Board's view, such conduct is as serious as that demonstrating personal dishonesty.[9]

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[8] Although the Board believes Respondent's actions in this matter were deliberate, it is not making the determination that intent is a necessary element for a finding of unfitness.

[9] One of the unique features of credit unions that distinguishes them from other types of financial institutions is that the members of their boards of directors are volunteers. In the case of credit unions, conduct such as that of Respondent's intentional misrepresentations is of particular significance because of the reliance volunteer boards place upon paid management's representations regarding financial condition when making decisions that affect not only the credit union's well-being, but also the interests of the credit union's membership and, though maybe considered more indirectly, the National Credit Union Share Insurance Fund (NCUSIF).

The Board rejects Respondent's assertion that he did not intend to mislead either the board of directors or NCUA. It is inconceivable that Respondent could take the actions he did and not know their effect on the representation of the credit union's financial condition and results of operations. Assuming, arguendo, he truly did not know that his actions would result in overstating income and available undivided earnings and cause the board of directors to act upon erroneous information, the Board finds that such a stunning failure to comprehend the most basic principles of credit union operations, or to hire someone who did, establishes that Respondent is incapable, unsuitable, incompetent, and unqualified to participate in the conduct of the affairs of a federally insured credit union. By his own admissions, Respondent lacked the qualifications to appropriately direct the accounting practices of Bay Gulf and knew that accounting expertise was needed. Transcript II at 15-16, 19. Yet, recognizing his own limitations and those of his staff in this regard, Transcript II at 13-14, he failed to take any action to remedy the situation. The Board believes that the effect of Respondent's unfitness is of the same magnitude as if his actions involved dishonesty.

The Board is mindful of its obligations to assure, to the extent possible, the safety and soundness of the institutions it regulates and insures and to protect the interests of credit union members. In this regard, Congress has provided the Board with strong enforcement powers. The Board recognizes that its sanction against Respondent is harsh, but believes that from a regulator's perspective, it is warranted.[10]

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[10] The NCUA Board's concern in issuing a prohibition order is not only to prevent an individual from continuing to serve in a particular credit union, but to assure that the individual does not reenter the industry in another credit union and again jeopardize that institution's safety and soundness, prejudice its members, or present an undue risk to the NCUSIF. While the court reviewed the present matter as a regulatory agency's action involving one individual, the Board believes its responsibilities require a broader view.

For the foregoing reasons, the Board issues the following Order of Prohibition.

Order of Prohibition

Pursuant to the authority vested in the National Credit Union Administration Board by Section 206(g)(4) of the FCU Act, 12 U.S.C. §1786(g)(4), and in accordance with Part 747 of the NCUA Rules and Regulations, 12 C.F.R. Part 747, it is hereby ordered that Respondent John R. Doolittle is prohibited from participating in any manner in the conduct of the affairs of Bay Gulf Federal Credit Union. Pursuant to Section 206(g)(7) of the FCU Act, 12 U.S.C. §1786(g)(7), Respondent may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of any institution defined in that section. In accordance with Section 206(g)(4) of the FCU Act, 12 U.S.C. §1786(g)(4), this order shall become effective thirty days after service upon Respondent and the credit union.

So ordered, this *[19th]* day of January, 1994, by the National Credit Union Administration Board.

/s/
Becky Baker
Secretary of the Board

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-4075

JOHN R. DOOLITTLE, as a person
participating in the affairs of
BAY GULF FEDERAL CREDIT UNION,

Petitioner,

versus

NATIONAL CREDIT UNION ADMINISTRATION,

Respondent.

On petition for Review from the
National Credit Union Administration Board

(November 17, 1993)

BEFORE: KRAVITCH and ANDERSON, Circuit Judges, and HILL, Senior Circuit Judge.

BY THE COURT:

The petitions for awards of attorney's fees and expenses to Petitioner's two attorneys are granted. The case is remanded to the agency for a determination of the amounts.

John R. DOOLITTLE, as a person participating in the affairs of Bay Gulf Federal Credit Union,
Petitioner,

V.

NATIONAL CREDIT UNION ADMINISTRATION,
Respondent.

No. 91-4075.

United States Court of Appeals,
Eleventh Circuit.

June 14, 1993.

President of credit union sought review of order of National Credit Union Administration (NCUA), No. 91-0201-III, which prohibited him from participating in affairs of federally insured credit union and directed him to make restitution. The Court of Appeals, Hill, Senior Circuit Judge, held that: (1) order of prohibition based on fitness must be supported by findings of the Board; (2) determination of unfitness must be supported by finding of equal gravity to finding of personal dishonesty; (3) evidence did not support finding that president engaged in unsafe or unsound practice with regard to certain loans or that his handling of loans breached fiduciary duties; and (4) findings did not support order of restitution.

Reversed in part and vacated and remanded in part.

Steven R. Bisker, Annandale, VA, for petitioner.

Barbara C. Biddle and Christine N. Kohl, Appt. Staff/Civ. Div., Dept. of Justice, Washington, DC, for respondent.

Petition for Review of an Order of the National Credit Union Administration.

Before KRAVITCH and ANDERSON, Circuit Judges, and HILL, Senior Circuit Judge.

HILL, Senior Circuit Judge:

John R. Doolittle appeals an order of the National Credit Union Administration that prohibits him from participating in any manner in the affairs of any federally-insured institution and directs him to pay the sum of $42,857 to Bay Gulf Credit Union as restitution. We vacate and remand the decision of the National Credit Union Administration.

I. Background

John R. Doolittle ("Doolittle") worked for Bay Gulf Credit Union ("Bay Gulf") for eighteen years, the last eight of which he served as president and was a member of the Board of Directors. Bay Gulf is a federally insured credit union, and as such it falls under the auspices of the National Credit Union Administration ("NCUA") pursuant to the Federal Credit Union Act ("FCU Act"), 12 U.S.C. § 1751, *et seq*. On April 19, 1990, Doolittle's employment with Bay Gulf was terminated by vote of the Board of Directors. Doolittle subsequently brought suit against Bay Gulf for breach of contract and against David Becker, a consultant for the NCUA who succeeded Doolittle as president, for tortious interference with a business and contractual relationship.

On February 12, 1991, the NCUA filed a Notice of Intent to Prohibit and Impose Other Remedial Sanctions ("Notice of Intent") against Doolittle. The Notice of Intent set forth five counts against Doolittle that charged him with violating the provisions of the FCU Act and accompanying regulations by engaging in unsafe and unsound practices, thus imperiling Bay Gulf and demonstrating Doolittle's unfitness to participate in the affairs of a federally insured credit union. The Notice of Intent did not allege and the record does not indicate that Doolittle derived any personal gain from the conduct set forth in the charges.

A formal administrative hearing was held before an Administrative Law Judge ("ALJ") who issued a Recommended Decision proposing that Doolittle be prohibited from future participation in the conduct of the affairs of any federally insured credit union and that he also be ordered to make restitution to Bay Gulf in the amount of $42,857. The NCUA Board adopted the ALJ's decision and recommended findings and conclusions in its October 15, 1991, Final Decision and Order after finding Doolittle's exceptions to the ALJ's decision non-meritorious. Doolittle then filed the appeal now before us.

The Notice of Intent alleged five counts of wrongdoing by Doolittle. Count I involved certain real estate, Priority One Learning Center ("Priority One"), owned by Bay Gulf. Priority One was valued on the books at $459,243 as a commercial property because a day care center had been operated there. This amount equaled the balance due on the outstanding loan on Priority One and was $30,000 less than a July 1989 appraisal. Desiring to know more about the property and the operation of a day care center in order to sell Priority One, Doolittle had a local real estate firm do an analysis of the property. The firm valued the property at $264,000 as residential property. Priority One was a commercial property in a residential area, but its zoning reverted to residential use while Bay Gulf owned it. The commercial zoning status could be renewed. Despite the apparent drop in the value of Priority One, Doolittle neither changed the valuation on the books nor adjusted the loan loss reserves to reflect a probable loss on the outstanding loan due to the reduced value of the property. Doolittle contended that he did not act on this market analysis because it failed to include the information he wanted about how to operate a day care center. The ALJ found that, in light of the change of the zoning, Doolittle should have obtained another appraisal after finding this one unsatisfactory, and, at a minimum, should have informed the Board of Directors. Before distributing any dividend, Bay Gulf was required to adjust its loan loss reserves to reflect any anticipated losses. Because Bay Gulf had only $50,000 in undivided earnings for the first quarter of 1990, even a $50,000 transfer to the loan loss reserves would have wiped out the undivided earnings, and Bay Gulf would have been unable to pay a

quarterly dividend without prior NCUA approval.

Counts II, III, and IV of the charges against Doolittle arise from certain accounting irregularities in Bay Gulf's books. The NCUA concluded that Doolittle breached his duty to insure that all transactions were recorded in an accurate and timely manner and reflected the results of the operation of Bay Gulf, and that such failures violated regulations requiring full and fair disclosure.

Specifically, Count II alleges improper accounting for legal expenses, data processing expenses, and employee sick time. The ALJ found that over $10,000 in legal expenses were invoiced in March, but recorded as an expense in April. The insurance reimbursement check for the legal expenses was received in April, but pursuant to Doolittle's specific directions, the reimbursement was recorded as income for March after the end of that month. Bay Gulf received a commitment from the insurer in March that it would pay $10,000. This recording method did not comply with either accrual or modified cash basis accounting, which are the two authorized accounting methods for credit unions.

Bay Gulf had a recurring monthly data processing expense of which Doolittle was aware. The ALJ found that the General Ledger indicated that a special entry was made so that the expense would appear in April rather than March. The amount of this deferred expense ($22,000) was material because of the negligible net income for the first quarter ($2,500). Doolittle testified without contradiction that the data processing expenses were recorded in the same manner from 1986 through March 1990 pursuant to an agreement between Bay Gulf and the data processing agent, and that there were always twelve bills recorded in each fiscal year.

The final violation alleged in Count II was that vested employee vacation, sick, and compensatory time was not recorded as a liability in the records of the Credit Union. Thus, the financial records failed to disclose an almost $100,000 liability. Doolittle testified without contradiction that employee leave time was recorded as an expense when taken rather than when it vested, and this practice had been consistently followed for several years.

Count III of the Notice of Intent charged Doolittle with improperly altering asset depreciation schedules to inflate income for the first quarter of 1990. Doolittle changed the depreciation lives of certain fixed assets in March, but he contended that these changes were made in response to a NCUA directive to reduce expenses. Doolittle checked with two board members who were IRS employees, and the changes complied with IRS guidelines. Doolittle admitted that the reason for the changes was to increase income for the quarter. The net effect of these changes for March alone was enough to determine whether the Credit Union showed a net profit or net loss for the first quarter of 1990. The ALJ found that where there is a change in an accounting estimate, there should have been some justification (like new evidence) and disclosure of the impact on the profitability of the institution.

Count IV concerns alleged improprieties in recording Non-Sufficient Funds ("NSF") income and Automatic Teller Machine ("ATM") income. Rather than being recorded as income, NSF and ATM fees were recorded as credits to the expense accounts. The effect of this accounting procedure was to decrease gross income which reduced the requisite transfer to statutory reserves, which, in turn, left more money available for the undivided earnings dividend pool. Doolittle testified without opposition that these fees were recorded in this manner since 1987 or 1988 without NCUA objection, and also contended that the accounting procedure had only a negligible impact on Bay Gulf's income and reserve transfers.

Count V involved certain unauthorized loans that Bay Gulf extended to one of its members, James Mims ("Mims"). In April 1989 Doolittle became aware that Bay Gulf had made commercial loans to Mims in violation of NCUA and Bay Gulf rules and regulations against commercial loans. Doolittle called a meeting between Mims and Bay Gulf personnel at which he informed Mims that no more loans would be made. Doolittle told the loan department supervisor who had handled Mims' file not to make any more loans to Mims and to mark the file accordingly. The loans were current at that time, and Doolittle did not inform the Board of

Directors or the NCUA of the unauthorized commercial loans until they later went into default. Despite Doolittle's instructions to the contrary, Bay Gulf made four more loans to Mims before he defaulted and eventually suffered a $42,857 loss. The ALJ concluded that Doolittle's failure to supervise his loan employees effectively and to inform the Board of Directors constituted a breach of his fiduciary duty and an unsafe and unsound practice. The ALJ further found that by failing to take effective measures and inform the board, Doolittle demonstrated reckless disregard of the prohibition against commercial loans.

II. Discussion

A. *Standard of Review*

We review the NCUA Board's decision on a narrow standard. Thus, we cannot reverse the NCUA Board's action unless the findings upon which it is based are not supported by substantial evidence, or unless the sanctions imposed by the Board constitute an abuse of discretion or are otherwise arbitrary and capricious. 5 U.S.C. § 706(2)(A), (E); *Sunshine State Bank v. Federal Deposit Ins. Corp.*, 783 F.2d 1580, 1584 (11th Cir.1986).

B. *Prohibition Sanction*

Section 1786(g)(1)[1] of the FCU Act gives the NCUA authority to

[1] This section states:

(g) Removal and prohibition authority

(1) Authority to issue order. Whenever the Board determines that--

(A) any institution-affiliated party has, directly or indirectly

(i) violated-

(I) any law or regulation;

(II) any cease-and-desist order which has become final;

(III) any condition imposed in writing by the Board in connection with the grant of any application or other request by such credit union; or

(IV) any written agreement between such credit union and

issue a prohibition order when it determines that a party has directly or indirectly violated any law or regulation, participated in an unsafe or unsound practice, or breached a fiduciary duty, and, by reason of such conduct, the financial interest of the credit union is imperiled. The NCUA Board must also conclude that the person has engaged in practice constituting personal dishonesty or is otherwise unfit to participate in the conduct of the affairs of a federally insured credit union.

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the Board;

(ii) engaged or participated in any unsafe or unsound practice in connection with any insured credit union or business institution; or

(iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)-

(i) such insured credit union or business institution has suffered or will probably suffer financial loss or other damage;

(ii) the interests of the insured credit union's members have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice or breach; and

(C) such violation, practice, or breach-

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates such party's unfitness to serve as a director or officer of, or to otherwise participate in the conduct of the affairs of, an insured credit union,

the Board may serve upon such party a written notice of the Board's intention to remove such party from office or to prohibit any further participation, by such party, in any manner in the conduct of the affairs of any insured credit union.

12 U.S.C.A. § 1786(g)(1) (West 1989).

In the instant case, the NCUA Board based its prohibition order primarily on Doolittle's alleged violations of laws or regulations, except for the breach of fiduciary duty found in relation the Mims loans. Specifically, the NCUA Board ruled, by adopting the ALJ's findings, that Doolittle violated 12 C.F.R. § 702.3(c)(2) by not making a proper allowance for loan losses with regard to the Priority One property involved in Count I. With regard to the accounting irregularities alleged in Counts II, III, and IV, the NCUA Board found that Doolittle violated both 12 C.F.R. § 702.3(b)(1) which requires full and fair disclosure of "all income and expenses necessary to present fairly the results of operations for the period concerned" and § 702.3(d) which requires the president to declare that the financial statements are true and correct to the best of his knowledge and present "fairly the financial position and the results of operations for the period covered." With regard to the Mims loans, the NCUA Board found that Doolittle breached his fiduciary duty and engaged in an unsafe and unsound practice, thereby satisfying 12 U.S.C. § 1786(g)(1)(A)(ii) and (iii).

Some of the accounting irregularities found by the NCUA Board support the conclusion that Doolittle violated NCUA regulations requiring adjustments to loan loss reserves and full and fair disclosure of the credit union's financial condition. In particular, the evidence suggests that Doolittle did have notice that the value of Priority One had fallen because of the change in zoning but failed to act on this knowledge. Also, Doolittle specifically directed that the insurance reimbursement check for legal services that was received in April be reported as income for March. The bill for the legal services was received in March, but was not listed as an expense until April. Doolittle's conduct in these matters implies intentional misrepresentation of the financial condition of Bay Gulf. To a lesser extent, the change in asset depreciation schedules involved in Count III also demonstrates misrepresentation because even though the alterations were justified under IRS guidelines, Doolittle instituted these changes without justification, other than to increase income, and failed to disclose the impact on profitability to the Board of Directors or the NCUA.

At first glance, these accounting practices seem relatively

insignificant, but Doolittle's conduct gains significance when viewed in light of the circumstances. March 1990 was the end of the first quarter of Bay Gulf's fiscal year. Dividends were payable on a quarterly basis, and, even with these accounting irregularities, Bay Gulf was only marginally profitable for the first quarter. The record indicates that if Bay Gulf had shown a loss for the first quarter, it would have had to obtain special permission from the NCUA prior to declaring its quarterly dividend. Furthermore, the NCUA had recently downgraded the competency rating of Bay Gulf s management due to its inability to improve the financial condition of the credit union. Given these circumstances, Doolittle was probably under some pressure to show a profit for the first quarter of 1990 so that Bay Gulf could declare a dividend. The NCUA Board found that each of the accounting violations it alleged was sufficient to change the outcome of the first quarter from loss to profit. Therefore, Doolittle's misrepresentations of Bay Gulf's financial condition for the first quarter of 1990 support the NCUA Board's determination that Doolittle violated regulations requiring full and fair disclosure of Bay Gulf's financial condition.

The remaining accounting irregularities found by the NCUA Board do not give rise to the inference that Doolittle violated full and fair disclosure regulations. Specifically, the improper accounting practices alleged in Count II, that data processing expenses were reported the month after the bill was received and that employee leave time was recorded as an expense when taken rather than when it vested, and in Count IV, netting NSF and ATM fee income against expenses, were, according to Doolittle's uncontroverted testimony, employed by Bay Gulf for several years. Doolittle testified without opposition that these items were recorded in the same manner since at least 1988 and the NCUA regularly inspected Bay Gulf's books without objection. Also, the data processing expenses recurred monthly, and Doolittle testified without contradiction that twelve such expenses were reported monthly in each fiscal year. Given the consistency of these accounting practices, the record does not contain substantial evidence to support the conclusion that Doolittle violated full and fair disclosure regulations by manipulating the accounting of these items to inflate Bay Gulf's income for the first quarter of 1990.

Similarly, the NCUA Board's determination that Doolittle's handling of the Mims loans was an unsafe and unsound practice and a breach of his fiduciary duty is not supported by substantial evidence. After Doolittle became aware of the problem loans, he took steps that he judged to be sufficient to prevent further escalation of the situation. Hindsight reveals that he did not do enough, but he cannot be held to have breached his fiduciary duty simply because his underlings failed to follow his orders. The loans were current at the time Doolittle took the actions for which he is now prosecuted. When the loans defaulted, he informed the Board of Directors and took action to reduce Bay Gulf s losses.

This is not a case where a fiduciary engaged in imprudent lending activities or stood idle and allowed damage to increase. Instead, Doolittle took what he mistakenly believed to be appropriate corrective actions. Doolittle's behavior does not resemble that which is traditionally considered to be a breach of fiduciary duty. See, e.g., *Hoye v. Meek*, 795 F.2d 893 (10th Cir.1986) (Bank director delegated too much authority to agent, failed to monitor agent, and failed to respond to bank's increasing exposure to risk); *Federal Deposit Ins. Corp. v. Butcher*, 660 F.Supp. 1274 (E.D.Tenn.1987) (Director's failure to provide time and attention required by the corporation, surrender of control and power to officers, committing large, unsecured loans to insolvent entities and to companies affiliated with corporation and its president, and failure to carefully examine financial reports); *Federal Deposit Ins. Corp. v. Wise*, 758 F.Supp. 1414 (D.Colo. 1991) (Directors caused bank to extend large, imprudent loans to favored parties contrary to bank policies and federal regulations, commit excessive assets high risk loans despite repeated warnings from state and federal regulators, acquire loans without full and adequate investigation, and enter transactions with affiliated parties contrary to lending and underwriting policies). Doolittle's response to the Mims loans does not reflect a breach of the sacred trust owed by a fiduciary, and therefore we cannot agree that Doolittle breached his fiduciary duty.

Neither can we agree that Doolittle engaged in an unsafe or

unsound practice with regard to the Mims loans. "Unsafe and unsound banking practices are defined as 'conduct deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder.' " *Northwest Natl Bank, Fayetteville,* Ark. v. Department *of the* Treasury, 917 F.2d 1111, 1115 (8th Cir.1990), *quoting First Nat'l Bank v. Department of the Treasury*, 568 F.2d 610, 611 (8th Cir.1978). Taking corrective actions to minimize the risk of loss on improvident loans is not conduct contrary to accepted standards of banking operations which might result in an abnormal risk to a banking institution. Thus, Doolittle did not engage in unsafe and unsound banking practices.

The prohibition sanction adopted by the NCUA Board is harsh. Doolittle is precluded from working in his chosen profession for the remainder of his career. We must assume that the NCUA Board considered all of the accounting violations in fashioning this draconian sanction. We hold that some of the violations relied upon by the NCUA, as described above, do not show that Doolittle breached the full and fair disclosure regulations in 12 C.F.R. § 702.3, and also that Doolittle's conduct with regard to the Mims loans did not breach his fiduciary duty or amount to unsafe or unsound practices. We cannot assume that the NCUA Board would issue the same severe sanction without all of the violations upon which it previously relied. Therefore, we vacate the prohibition order and remand this case to the NCUA Board for reconsideration in light of only those accounting practices which we find to be indicative of Doolittle's violating his obligation to full and fair disclosure of Bay Gulf's financial condition.

We must also explore the meaning of 12 U.S.C. § 1786(g)(1)(C), which provides that when the NCUA Board determines that a party has engaged in a violation, practice, or breach that satisfies subparagraph (A) (violation of law or regulation, unsafe or unsound practice, or breach of fiduciary duty) and subparagraph (B) (jeopardizes financial interests of credit union and members or inures to personal benefit of party), the Board may order prohibition if it also finds that such violation, practice, or breach involves personal dishonesty (1786(g)(1)(C)(i)) or "demonstrates

such party's unfitness to serve as a director or officer of, or to otherwise participate in the conduct of the affairs of, an insured credit union." (1786(g)(1)(C)(ii)). Because there is no indication of personal dishonesty, the NCUA Board based the prohibition order on unfitness to serve. The NCUA Board did not specify how Doolittle's conduct demonstrated his unfitness to serve as an officer and director, but, instead, the Board merely adopted the ALJ's cursory conclusion that all of the statutory requirements for a prohibition order had been met. We conclude that this omission cannot stand.

When divining the meaning of a statute, we must bear in mind "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative..... *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249, 105 S.Ct. 2587, 2594, 86 L.Ed.2d 168 (1985). Applying this maxim to subsection 1786(g)(1)(C)(ii) leads to the conclusion that the NCUA Board must make some finding as to a party's fitness to participate in the conduct of the affairs of a credit union. This finding must be more than a violation, practice, or breach sufficient to satisfy subparagraph (A) because otherwise subsection 1786(g)(1)(C)(ii) would be surplusage. Thus, the NCUA must do more than find a subparagraph (A) violation, practice, or breach and recite such as the basis for concluding that subparagraph (C) is satisfied.

Subparagraph (C) provides that a prohibition order may be based either on a finding of personal dishonesty or on a finding of unfitness to serve. We interpret this juxtaposition to mean that the NCUA Board's determination of unfitness must be supported by a finding of equal gravity to a finding of personal dishonesty. This conclusion is supported by cases interpreting the analogous removal and prohibition section of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(e)(1). Subparagraphs 1818(e)(1)(A) and (B) contain nearly identical language to 12 U.S.C. § 1786(g)(1)(A) and (B). Subparagraph 1818(e)(1)(C) of the FDI Act provides that a prohibition order may issue when the agency determines that a party has engaged in a violation, practice, or breach which:

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates willful or continuing disregard by such party for the safety or soundness or such insured depository institution or business institution.

12 U.S.C.A 1818(e)(1)(C) (West 1989). Conduct sufficient to satisfy subsection 1818(e)(1)(C)(ii) must have the same magnitude as personal dishonesty. See, e.g., *Jameson v. Federal Deposit Ins. Corp.*, 931 F.2d 290 (5th Cir.1991) (falsification of bank records to conceal bonus from other bank officials); *Van Dyke v. Board of Gov. of the Fed Reserve Sys.*, 876 F.2d 1377 (8th Cir. 1989) (bank officer participated in check-kiting scheme); *Brickner v. Federal Deposit Ins. Corp.*, 747 F.2d 1198 (8th Cir.1984) (continuing disregard evinced where bank officers knew cashier was engaging in unsafe and unsound banking practices for months, but failed to take suitable preventative action before substantial losses occurred); *[Anonymous] v. Federal Deposit Ins. Corp.*, 619 F.Supp. 866 (D.D.C.1985) (interim suspension order required allegations of dishonesty or habitually disastrous banking practices). Enlightened by cases interpreting the FDI Act's prohibition section, we conclude that a prohibition order under the FCU Act which is based on a party's unfitness to serve must be supported by a finding of similar magnitude as personal dishonesty.

Therefore, we hold that the NCUA Board must provide some explanation of why Doolittle is unfit to serve as a director and officer of Bay Gulf beyond merely stating that he violated a law or regulation or breaches his fiduciary duty. This justification must have weight commensurate with a finding of personal dishonesty.

C. *Restitution Sanction*

The NCUA Board ordered Doolittle to make restitution to Bay Gulf in the amount of $42,857, which equals Bay Gulf's losses on the Mims loans. The NCUA issued this order pursuant to 12 U.S.C. § 1786(e)(3)[2] which grants authority to the NCUA to order

[2] This statute states:

restitution when it finds that a party has engaged in any violation or practice that involves a reckless disregard for the law or any applicable regulations. Here, the NCUA Board determined that Doolittle's conduct in relation to the Mims loans displayed reckless disregard of NCUA regulations prohibiting credit unions from extending commercial loans to its members. 12 C.F.R. § 701.21(h) provides that a credit union shall not make business loans to its members unless the Board of Directors has adopted a written loan policy authorizing a commercial loan to that specific type of business. Bay Gulf had no policy allowing loans to the type of business run by Mims; thus, the Mims loans were made in violation of this regulation.

---

(3) Affirmative action to correct conditions resulting from violations or practices. The authority to issue an order under this subsection and subsection (f) of this section which requires an insured credit union or any institution-affiliated party to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such insured credit union or such party to-

(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if-

(i) such credit union or such party was unjustly enriched in connection with such violation or practice; or (ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the Board;

(B) restrict the growth of the institution;

(C) rescind agreements or contracts;

(D) dispose of any loan or asset involved; and

(E) employ qualified officers or employees (who may be subject to approval by the Board at the direction of such Board); and

(F) take such other action as the Board determines to be appropriate.

12 U.S.C.A. § 1786(e)(3) (West 1989).

The NCUA Board determined that Doolittle demonstrated reckless disregard for 12 C.F.R. 701.21(h) by failing "to take other reasonably prudent steps to insure that no further loans would be made" and by failing "to act effectively and diligently once he learned of the illegal loans." In particular, the NCUA adopted the ALJ's conclusion that Doolittle should have informed the Board of Directors of the unauthorized loans much sooner. Also, the NCUA Board found that Doolittle should have done more than telling only one loan supervisor to make no further loans and mark the file accordingly.

We do not agree that Doolittle's behavior manifested reckless disregard for the regulation prohibiting commercial loans. According to Doolittle's uncontroverted testimony, he took those actions which he honestly believed would remedy the problem. Mims did not default on the loans until six months later after four more loans had been made contrary to Doolittle's orders. Hindsight reveals that Doolittle could have done more to prevent Bay Gulf's exposure from increasing, but the clarity of *ex post facto* examination does not inform us as to Doolittle's mental state at the time of the alleged infraction. Doolittle's judgment proved to be unwise, but he certainly did not disregard the commercial loan interdiction.

The NCUA argues that *Brickner v. Federal Deposit Ins. Corp.*, supra, is on four squares with the present case and, accordingly, we should uphold the NCUA Board's determination that Doolittle showed reckless disregard. In Brickner, the FDIC sought removal of bank officers pursuant to the FDI Act, 12 U.S.C. § 1818(e)(1)(C)(ii), which authorizes removal when an officer engages in an act or practice which demonstrates a continuing disregard for the soundness of the bank. The conduct in question was the officers' failure to take appropriate steps to curtail unsafe and unsound activities of a bank cashier who repeatedly disobeyed their directions to cease the activities. The officers did not disclose the continuing illicit activities of the cashier to the other directors or the FDIC until FDIC examiners discovered the activities. After determining that "continuing disregard" is akin to "reckless disregard," the court found that the officers exhibited continuing

disregard because they knew for months that the cashier was "engaging in unsafe and unsound banking practices, yet they failed to disclose this knowledge to the other directors or to take suitable action to prevent substantial losses to the Bank." *Brickner*, 747 F.2d at 1203.

At first glance, this seems to be our case exactly, but there is a crucial distinction. In *Brickner* the officers knew that their orders were disobeyed, whereas Doolittle did not know that his instructions were defied. The *Brickner* officers knew their actions were ineffective, but failed to do more and were thus found liable for disregarding their duty to protect the bank from unsafe practices. Doolittle, by contrast, took what he reasonably thought were effective steps to curtail the extension of unauthorized loans. When he discovered that his actions were insufficient; i.e., when the loans defaulted, he informed the board of directors and the NCUA and took immediate actions to limit Bay Gulf's losses. While the *Brickner* officers disregarded their duty by knowingly failing to take effective remedial measurers, Doolittle responded to the Mims loans with actions that he believed were sufficient, even though the actions turned out to be not enough. We do not agree that Doolittle demonstrated reckless disregard of the commercial loan prohibition.

Because we find that Doolittle did not act with reckless disregard, the restitution sanction cannot stand. The legislative history of 12 U.S.C. § 1786(e)(3) supports this outcome in that it indicates that the restitution sanction is reserved for "serious misconduct." H.R.Rep. No. 54, 101st Cong., lst Sess., pt. 1, at 392 (1989), *reprinted* in 1989 U.S.C.C.A.N. 86, 188. Doolittle's poor judgment did not amount to his engaging in serious misconduct. Due to the absence of reckless disregard, we reverse the NCUA Board's order that Doolittle pay restitution to Bay Gulf.

III. Conclusion

We VACATE the NCUA Board's prohibition order and REMAND for reconsideration in accordance with this opinion. We REVERSE the NCUA Board's order that Doolittle make restitution to Bay Gulf in the amount of $42,857.

(2)

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No. 95-329

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN R. DOOLITTLE, PETITIONER

v.

NATIONAL CREDIT UNION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA C. BIDDLE
EDWARD HIMMELFARB
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether petitioner had notice and an opportunity to be heard regarding one of the administrative findings that was a prerequisite to the order barring him from further participation in the conduct of the affairs of a federally chartered or insured financial institution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a3-a4) is unpublished, but the decision is noted at 48 F.3d 536 (Table). The earlier opinion of the court of appeals (Pet. App. a17-a32) is reported at 992 F.2d 1531.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1995. The petition for rehearing was denied on May 16, 1995 (Pet. App. a1-a2). The petition for a writ of certiorari was filed on August 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Credit Union Administration (NCUA) Board is the independent federal agency that charters, insures, and regulates federal credit unions. Under the Federal Credit Union Act (FCU Act), the Board's enforcement responsibilities are akin to those of the FDIC, the Office of Thrift Supervision, the Comptroller of the Currency, and the Federal Reserve Board, which oversee the regulated functions of other financial institutions. 12 U.S.C. 1766.

The NCUA Board has authority to remove a credit union official from office or prohibit the official's further participation in the conduct of the affairs of any insured credit union. See 12 U.S.C. 1786(g)(2). Such action has the effect of barring the official's participation in the affairs of any federally insured financial institution. See 12 U.S.C. 1786(g)(7). To take such action, the Board must first issue a Notice of Intent that includes three determinations. First, the Board must find misconduct; it must find that the "institution-affiliated party has, directly or indirectly[,] (i) violated * * * any law or regulation; * * * (ii) engaged or participated in any unsafe or unsound practice in connection with any insured credit union or business institution; or (iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty." 12 U.S.C. 1786(g)(1)(A). Second, the Board must find that the misconduct had a proscribed effect: that, as a result of the misconduct, either the credit union "has suffered or will probably suffer financial loss or other damage," or the members' interests "have been or could be prejudiced," or the party has "received financial gain or other benefit." 12 U.S.C.

1786(g)(1)(B). Third, the Board must determine that the violation, practice, or breach either involves personal dishonesty or "demonstrates such party's unfitness to serve as a director or officer of, or to otherwise participate in the conduct of the affairs of, an insured credit union." 12 U.S.C. 1786(g)(1)(C). After a hearing on such charges, if the Board finds "upon the record * * * that any of the grounds specified in [the] notice have been established," it may issue an order of removal or prohibition. 12 U.S.C. 1786(g)(4).

2. Petitioner was employed by Bay Gulf Federal Credit Union, in Tampa, Florida, for approximately 18 years, serving as the compensated manager/president and as a member of the Board of Directors from January, 1982, until his forced resignation in April, 1990. Pet. App. a18. An NCUA examination of Bay Gulf as of December 31, 1989, showed that the credit union had suffered net losses in 1988 and 1989 and had material weaknesses, suggesting that its solvency could be significantly affected by adverse economic changes. Gov't C.A. Br. 8. A rating of Bay Gulf's management competence was downgraded. Pet. App. a25.

3. In February, 1991, the NCUA Board issued a "Notice of Intent to Prohibit and Impose Other Remedial Sanctions" to petitioner, charging him with violations of the FCU Act, the agency's regulations, Bay Gulf's bylaws, and generally accepted accounting principles; unsafe and unsound practices; and breach of his fiduciary duty. Pet. App. a18. The Notice of Intent set forth five counts against him. *Id.* at a19. Four counts charged violations of the NCUA's regulations requiring that a credit union's financial statements make "full and fair disclosure" of all assets, liabilities, equity, income, and expenses for the period

concerned, 12 C.F.R. 702.3. The fifth charged petitioner with unsafe and unsound practices and breach of fiduciary duty concerning certain improper commercial loans. Pet. App. a19-a22.

Following a three-day hearing, an ALJ rendered a decision recommending the issuance of an order of prohibition and restitution against petitioner on the ground that the NCUA had sustained its burden of proving all five counts. Pet. App. a19. Petitioner filed exceptions with the NCUA Board. In a final decision issued on October 15, 1991, the NCUA Board adopted the ALJ's decision and ordered that petitioner be prohibited from participating in the affairs of any federally insured or chartered institution, and that he pay restitution to Bay Gulf in the amount of $42,857. *Ibid.*

4. Petitioner sought judicial review of the NCUA Board's order, and the court of appeals upheld two counts and a portion of a third count against petitioner, noting that petitioner's "conduct in these matters implies intentional misrepresentation of the financial condition of Bay Gulf." Pet. App. a24. However, finding a lack of substantial evidence to support the remaining counts against petitioner, the court vacated the order of prohibition and remanded to the NCUA Board for reconsideration. *Id.* at a27. The court also reversed the order of restitution. *Id.* at a32.

5. Upon further briefing by the parties following remand, the NCUA Board reinstated its order of prohibition against petitioner. Pet. App. a5-a15. With respect to the first and third prongs of the standard for prohibition, the NCUA Board found that petitioner had engaged in intentional misconduct under 12 U.S.C. 1786(g)(1)(A) (see Pet. App. a7-a9), and that

petitioner's conduct "demonstrate[d] [his] unfitness to serve as a director or officer of, or to otherwise participate in the conduct of the affairs of, an insured credit union" under 12 U.S.C. 1786(g)(1)(C) (see Pet. App. a11-a14).

The Board also found that the "effects" prong of the statutory standard was satisfied on two bases. First, the Board found (Pet. App. a9-a10) that petitioner's misconduct led Bay Gulf's volunteer board of directors unwittingly to take the dangerous step of paying dividends for the first quarter of 1990 while unaware that the credit union had insufficient earnings to do so. Second, the Board found that petitioner received personal benefit as a result of his misconduct. Pet. App. a10. The Board stated that, given the NCUA's then-recent downgrading of the competency of Bay Gulf's management for its inability to improve the credit union's financial condition, petitioner "was probably under some pressure to show a profit," and that he therefore "personally benefitted" from his misconduct when, as a result of being able to show the hoped-for profit, he retained his job. *Ibid.* (quoting *id.* at a25); see *id.* at a10 n.4.

6. Petitioner again sought judicial review. On February 15, 1995, the court of appeals upheld the order of prohibition without comment in an unpublished order. *Id.* at a3-a4.

ARGUMENT

Petitioner's primary claim of error (Pet. 7-8) is that the court of appeals upheld the NCUA Board's finding on remand that petitioner had obtained a "personal benefit" (Pet. App. a10) from his misconduct, despite the court's statement in the first appeal that the Notice of Intent did not allege (and the record

did not show) that petitioner derived any "personal gain" from his misconduct. *Id.* at a18. Petitioner asserts that he therefore had no notice or opportunity to be heard regarding whether he obtained a "personal benefit" or "personal gain," and that that failure violated the Due Process Clause of the Fifth Amendment. Pet. 8.

Petitioner's claim is meritless. The "personal benefit" theory was raised at the very start of the administrative proceedings, and petitioner had ample opportunity to litigate that issue. NCUA counsel explained in her opening statement at the hearing before the NCUA's administrative law judge that the government would show that, although petitioner "may not have had any personal financial gain, his conduct was geared to obtain a personal benefit for himself." 1 Hearing Tr. 12. She explained that the "benefit to [him] from these accounting maneuvers, given his position as General Manager, is clear: If the credit union looked good, he would look good, and his job would be protected." *Id.* at 14. See Pet. App. a10 n.4. Petitioner had more than adequate opportunity to be heard on the issue at that hearing and at later proceedings in this case before the NCUA and the court of appeals. Although he was unable to rebut the clear import of the evidence on that point, his failure to do so was not the result of any procedural irregularity.

Petitioner's claim also appears to be based on a misreading of the language of the applicable statute. The FCU Act does not limit the sanction of an order of prohibition to those cases in which it can be shown that the subject of the order received "personal gain" (Pet. 8), which petitioner presumably understands to mean direct payments of funds to which he was not legally entitled. Instead, the Act provides authority

to impose an order of prohibition if the person "received financial gain *or other benefit* by reason of such violation." 12 U.S.C. 1786(g)(1)(B)(iii) (emphasis added). As the language of the provision makes clear, "financial gain" (what petitioner refers to as "personal gain") and "other benefit" (what the NCUA Board referred to as "personal benefit") are independent bases for satisfying the statutory requirement.* Thus, even if there were no financial gain—that is, no *monetary* benefit, see, *e.g.*, *Jameson* v. *FDIC*, 931 F.2d 290, 291 (5th Cir. 1991) (concealing bonus); *Van Dyke* v. *Board of Governors*, 876 F.2d 1377, 1379 (8th Cir. 1989) (check-kiting scheme)—that would not mean that a non-monetary "other benefit" could not exist. As the court of appeals recognized, petitioner "was probably under some pressure to show a profit for the first quarter of 1990 so that Bay Gulf could declare a dividend." Pet. App. a25. For petitioner, then, there was the very real "other benefit" of enhancing his stature (and thus protecting his job) with Bay Gulf's board of directors, who had just been made

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* For this reason, petitioner's reliance on the statement by the court of appeals that he had derived no "personal gain" (Pet. 8) is misleading. The court of appeals stated in its first opinion that the "Notice of Intent did not allege and the record does not indicate that [petitioner] derived any personal gain" from his misconduct. Pet. App. a18. But it went on to suggest in that same opinion that the misconduct may have occurred because petitioner "was probably under some pressure to show a profit * * * so that Bay Gulf could declare a dividend." *Id.* at a25. Thus, as the court of appeals necessarily found in ultimately upholding the order of prohibition, the NCUA Board's finding that petitioner derived a "benefit" from his misconduct by avoiding the threat that lay behind this pressure to turn a profit, *id.* at a10, is consistent with both the Notice of Intent and the earlier decision of the court.

aware that his management had been downgraded for failure to improve Bay Gulf's financial condition in 1988 and 1989.

In any event, even if the Board's finding of personal benefit were defective, the order of prohibition would nonetheless be valid on the basis of the Board's alternative "effects" finding (Pet. App. a8-a9) that petitioner's misconduct prejudiced the interests of the credit union members. Because of petitioner's misconduct, the credit union's board of directors paid dividends at a time when it did not have the earnings to support them. As the Board observed, that practice "threatens the financial soundness of a credit union and can lead to the institution's insolvency." *Id.* at a9. It therefore "prejudice[d]" the interests of the members of the credit union. 12 U.S.C. 1786(g)(1)(B). Contrary to petitioner's contention (Pet. 8 n.2), this issue was involved in the proceedings from the beginning. See 1 Hearing Tr. 11-12 (opening statement of NCUA counsel at administrative hearing that "the [government] will * * * show that, by reason of [petitioner's] conduct, * * * the interests of the members have been prejudiced").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
BARBARA C. BIDDLE
EDWARD HIMMELFARB
Attorneys

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In the Supreme Court of The United States

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JOHN R. DOOLITTLE,

Petitioner,

v.

NATIONAL CREDIT UNION ADMINISTRATION,

Respondent

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

Steven R. Bisker, Esq.
Counsel of Record
Steven R. Bisker
Attorney at Law
616 S. Washington Street
Alexandria, VA 22314
(703) 739-0292

November 8, 1995

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PETITIONER'S REPLY BRIEF

Respondent's arguments highlight why this Court should grant the petition. This is a prime example of "Big Government" using its resources to get its way at any cost; and the individual be damned.

Respondent would have this Court rely on artful arguments that if accepted, would deny Petitioner his right to due process.

I. Notice was Inadequate to Give Petitioner a Clear Statement of the Theory on Which the Respondent was Proceeding Against Him.

Due process requires that an administrative agency give the

party charged a clear statement of the theory on which the agency will proceed with its case. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) *citing Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971). This concept of due process was incorporated by Congress into the Administrative Procedure Act, wherein: "[p]ersons entitled to notice of agency hearing must be timely informed of...the matters of fact and law asserted." 5 U.S.C. §554(b).

There is no dispute as to the fact that the "personal benefit" theory relied upon by Respondent was not contained in the "Notice of Intent to Prohibit and Impose Other Remedial Sanctions".[1] Instead, Respondent argues that "petitioner had ample opportunity to litigate that issue... [since] NCUA counsel explained in her opening statement at the hearing before the NCUA's administrative law judge" that while he did not receive financial gain "his conduct was geared to obtain a personal benefit for himself." Opp. 6. However, this issue was neither developed or argued by Respondent during the course of the administrative hearing.

Respondent's assertion, must be evaluated in the light of the NCUA's Final Decision and Order that resulted from the administrative hearing. Respondent found that: "While it is true that Doolittle did not personally profit from making the Mims loans, that is irrelevant to this proceeding. The only issue before us is whether Doolittle's failure to take appropriate action on the loans resulted in harm to Bay Gulf, and the answer is affirmative." (Emphasis added.) Fin. Ord.. 5. Respondent's representations to this Court stand in stark contrast to its stated position in its Final Decision and Order.

II. "Personal Benefit" is Subsumed Within the Definition of "Personal Gain".

The FCU Act provides authority to impose an order of prohibition if the person "received *financial gain* or *other benefit.*"

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[1] Paragraph 37 of the Notice limited the "effects" element to "financial loss and other injury" to the credit union stemming from the Mims loans.

12 U.S.C. §1786(g)(1)(B)(iii) (emphasis added).

Respondent attempts to distinguish "other benefit" (what the NCUA Board referred to as "personal benefit") (Opp. 6 - 7) from "personal profit" (which the NCUA Board determined did not exist) (Fin. Ord. 5) and also from "personal gain" (which the first court of appeals found not to exist) (Pet. App. a-5).

Respondent argues that "personal gain" is the same as "financial gain" and therefore, when the first court of appeals held that "personal gain" was not alleged in the Notice of Intent nor contained in the record (Pet. App. a-18), it did not preclude the NCUA Board's finding of "other benefit" in its reinstatement of the order of prohibition (Pet. App. a-5). This reading is plainly wrong.

"Benefit" is defined as "a pecuniary advantage or profit; gain; account; interest." Black's Law Dictionary 200 (4th ed. 1951). As is evident from this definition, there is no significant distinction between the words "benefit" and "gain" since one definition of "benefit" is "gain" Similarly, there is no discernible difference between the word "benefit" and "profit" as is readily apparent from the definition. *Id.*

Therefore, given that the NCUA found that: "Doolittle did not personally profit" (Fin. Ord 5) and the court of appeals found no assertion or proof of "personal gain" (Pet. App. a-18), it is hyperbole to suggest that "personal benefit" is somehow distinctive and provides another basis to satisfy the "effects" requirement of 12 U.S.C §1786(g)(1)(B).

Respondent has failed to focus on the first words in the terms "personal gain" and "financial gain". For it is through this analysis that the disjunctive, "financial gain *or* other benefit" in 12 U.S.C. §1786(g)(1)(B)(iii) (emphasis added), becomes clear. "Financial" is defined as "fiscal; dealing in money". Black's Law Dictionary 758 (4th ed. 1951). "Personal" is defined as "appertaining to the person". *Id.* at 1300. While "personal" is broad in its scope as a modifier of the word "gain" and includes

anything "appertaining to the person", "financial", on the other hand, is limited to a monetary gain. Therefore, the term "other benefit", or as the NCUA refers to it, "personal benefit" is essentially synonymous with the term "personal gain."

Inasmuch as the first court of appeals found no "personal gain" (Pet. App. a-18), the second court of appeal's apparent reliance on Respondent's misreading of the FCU Act caused it to improperly overrule a prior panel's decision.

III. Petitioner was not Given Proper Notice of the Alternative "Effect" Finding Concerning the Payment of Dividends.

Respondent argues that "even if the Board's finding of personal benefit were defective, the order of prohibition would nonetheless be valid on the basis of the Board's alternative 'effects' finding (Pet. App. a8-a9) that *petitioner's misconduct prejudiced the interests of the credit union members*." Opp. 8 (emphasis added). Respondent does not dispute that this charge was not contained in the Notice of Intent to Prohibit. Rather, in support of its argument that Petitioner did receive notice of the charge, Respondent cites to the opening statement of NCUA counsel at the administrative hearing wherein she stated that "the [government] will * * * show that, by reason of [petitioner's] conduct, * * * the interests of the members have been prejudiced" as the notice provided to Petitioner. *Id.*

Again, Respondent misleads this Court. The NCUA Board Decision and Order on Remand (Pet. App. a-9) relies on the dividend issue to support a showing of possible financial loss to Bay Gulf Federal Credit Union, the alternative "effect" finding in 12 U.S.C. §1786(g)(1)(B)(i) ("such insured credit union...has suffered or will probably suffer financial loss or other damage"). However, in supporting its argument (Opp. 8) that notice was provided to Petitioner, Respondent cites to the NCUA counsel's statement that she will show "the interests of the members have been prejudiced" Prejudice to the members is a separate and distinct "effect" finding in 12 U.S.C. §1786(g)(1)(B)(ii).

Therefore, as evidenced by Respondent's own representation to this Court, the asserted oral notice to Petitioner during the opening statement at the hearing did not provide notice of the charge that was ultimately cited by the NCUA Board in its Order on Remand (Pet. App. a-10, a-11).

Further, even if the notice was not defective, there is nothing in the record (i.e., documents or testimony) to support a finding that the members of the credit union were prejudiced by the payment of dividends which they received. Similarly, the administrative hearing record is devoid of any documentation on any loss or probable loss suffered by the credit union.

The NCUA addressed the payment issue in a limited context. In arguing why Doolittle's accounting practices were meaningful, the NCUA noted that the credit union would have to obtain special permission from the NCUA prior to declaring a dividend if it had insufficient earnings. Pet. App. a-25. Any suggestion of a loss or probable loss to the credit union was presented for the first time during the remand to the NCUA. There was no further testimony or document submission on this issue. Pet. App. 8 fn. 2.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Steven R. Bisker
Counsel of Record
Steven R. Bisker
Attorney at Law
616 S. Washington Street
Alexandria, VA 22314
(703) 739-0292